



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 3 OF 2015

TWO THIRDS INVESTMENT LIMITED & 10 OTHERS PLAINTIFFS

-VERSUS-

KATANA SAID KALAMA & 3 OTHERS..... DEFENDANTS

RULING

(Application for mandatory injunction to have defendants move out and demolish structures in plots where they had been directed not to interfere; there being a parallel proceeding for adverse possession filed by the defendants and others; order only issued to the defendants in this case and not to the other parties in the adverse possession case; probable that developments have been made by the other persons in the adverse possession case; not prudent therefore to issue the orders sought; application dismissed)

1. The application before me is that dated 20 September 2021, filed by the plaintiffs in the suit Mombasa ELC No. 3 of 2015. The application seeks orders for a mandatory injunction directing the defendants to, within 7 days from the date of the order, demolish to ground level all the structures standing on Plot Numbers MN/II/6212, 6213, 6214, 6215, 6216, 6217, 6218, 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6235, 6236, 6237, 6238, 6241, 6242, 6243, 6244, 6249, 6250, 6251, 6252, 6254, 6257, 6258, 6259, 6260, 6261, 6265, 6266, 6267, 6271, 6274, 6275, 6276, 6277, 6278, 6279, 6280, 6281, 6282, 6283, 6284, 6286, 6287, 6288, 6289, 6290, 6291, 6292, 6293, 6294, 6295, 6296, 6297, 6301, 6302, 6304, 6305, 6306, 6307, 6308, 6309, 6310, 6311, 6312, 6316, 6317, 6318, 6319, 6321, 6322, 6323, 6324, 6325, 6326, 6327, 6328, 6329, 6330, 6331, 6333, 6334, 6335, 6336, 6336, 6337, 6338, 6339, 6340, 6341, 6342, 6343, 6344, 6345, 6346, 6347, 6348, 6350, 6356, 6357, 6358, 6359, 6360, 6361, 6362, 6363, 6364, 6365, 6365, 6366, 6367, 6368, 6369- Original CR No. 1222, MN/II/390 (hereinafter referred to as 'the protected plots') and vacate the said plots, failure to which the plaintiffs be at liberty to demolish them and remove any persons who may refuse to vacate the same. There is also a prayer for an order directing the Officer Commanding Bamburi Police Station to provide security during the demolition and eviction.

2. To put matters into context, the plaintiffs/applicants filed this suit registered as Mombasa ELC No. 3 of 2015 against four persons, being Katana Said Kalama, Ali Mwakaneno, Kassim Stephen Chembe, and Juma Kazungu Mweni, seeking orders to have them permanently restrained from the Plots Nos. MN/II/6212-6369 (original CR No. 1222, MN/II/390) (hereinafter referred to as the suit properties). The named four defendants and others, in total 41 persons, had earlier filed the suit Mombasa ELC No. 232 of 2014 (OS) seeking orders to be declared owners of the land parcel MN/II/390 by way of adverse possession. The two suits were consolidated on 2 November 2018.

3. On 20 January 2015, the applicants herein, within their suit Mombasa ELC No. 3 of 2015, filed an application seeking injunctive orders to restrain the 4 defendants from encroaching, trespassing, constructing, fencing, cultivating, grazing, obstructing the applicant's right of ingress and/or out of all the 158 subdivided plots of CR No. 1222 MN/II/390 (the suit properties). Arising out of the application, parties agreed that a survey of the plots be conducted in order to determine the level of occupation (if any) of the defendants. This was done on 30 June 2015, and the court (Omollo J), heavily relying on the survey report, on 6 July 2018, delivered a ruling on the application for injunction. The report identified that the defendants occupied 30 plots out of the total 158 plots. The court thus granted the injunctive orders but limited the same to the remaining 128 plots (the protected plots). I need to mention that the plaintiffs in the case Mombasa ELC No. 242 of 2014 (OS), apart from the 4 defendants in Mombasa ELC No. 3 of 2015, did not participate in this application for injunction.

4. Turning back to the subject application, the same is premised on the grounds that following the ruling of 6 July 2016, this court issued an order of injunction against the defendants and their agents restraining them from encroaching, trespassing, cultivating and obstructing the applicants' right of ingress and/or egress into and/or out of the protected plots. The applicants contend that the defendants have violated the court order by erecting illegal structures, subdividing, and selling them off to third parties, and attempting to obtain titles surreptitiously. According to the plaintiffs, the protected plots are threatened with complete wastage and loss unless the orders of 6 July 2016, which were meant to protect the said plots, are enforced, or else, this suit would be rendered nugatory.

5. The application is supported by the affidavit of Joshua Mugambi Mugaa, an associate surveyor practicing in the firm of Edward Kiguru Licensed Land Surveyor. He deposed that on 7 September 2021, he carried out a picking survey on the suit land, and it was established that the defendants and their agents have moved out of the unprotected plots and into the protected plots and have further erected illegal structures

thereon. He deposed that those structures were not in existence at the time of the survey of 30 June 2015. He annexed a survey report to demonstrate his findings. Mr. Mugaa deposed that some of the defendants have filed a suit in the Chief Magistrate Courts at Mombasa, *ELC Division, Msa CM. ELC Case No. E061 of 2021 (OS) Mwinyi Faki Hussein vs. Midworld Enterprises International Limited*. He deposed that in that case, the plaintiffs seek to be issued with titles over the protected plots. He deposed that the protected plots are threatened with complete wastage and loss unless the orders of 6th July 2016 which were meant to protect the suit land are enforced.

6. To oppose the application, a Replying Affidavit of one Sidi Mashe Wanje, who referred to herself as the representative of the defendants, was filed. Sidi Mashe Wanje is one of the plaintiffs in the adverse possession case but is not among the defendants in the suit Mombasa ELC No. 3 of 2015. She agreed that indeed there was a ruling dated 6 July 2016 with injunctive orders restraining the defendants (in the suit Mombasa ELC No. 3 of 2015) and their agents from dealing with the protected plots in any way, and that the order exempted some portion of the land which the defendants were in occupation of at the time of the survey. She denied that they are selling off the suit plots to third parties. She deposed that the sale agreements that Mr. Mugaa was referring to were signed in 2015 before the subject court order was issued. She denied that there are illegal structures erected against the order of 6 July 2016. She averred that the orders sought herein are mandatory in nature and can only be obtained after a hearing of the suit and that granting the orders will render the suit a mere academic exercise.

7. I directed that counsel do file written submissions in respect of the application. Written submissions were filed by Mr. Maundu, learned counsel for the applicants, and Mr. Muyala learned counsel who appears for Ms. Sidi Mashe Wanje and 7 other persons in the suit Mombasa ELC No. 232 of 2014 (OS).

8. In his written submission, Mr. Maundu, referred me to three cases being, *New Design Construction Limited vs. Lyne Kerubo Mandieka (2020) eKLR*; the Court of Appeal decision in *Joseph Kaloki t/a Royal Family Assembly vs. Nancy Atieno Ouma (2020) eKLR* and lastly, *Kenya Breweries Limited and Another vs. Washington O. Okeyo (2002) eKLR*. They all outline the principles that the court should consider when faced with an application for a mandatory injunction. Counsel submitted that the court order of 6 July 2016 has never been varied or reviewed and that there is evidence that the defendants are in violation of the orders of 15 July 2018. He thus submitted that there are special circumstances which would entitle the applicants to the order of mandatory injunction.

9. In his written submissions, Mr. Muyala submitted that nothing has been shown, or evidence placed before the court, to indicate that the defendants have gone out of the areas that they are currently in occupation. He submitted that if the orders are issued at this state, the hearing of the main suit will be rendered an academic exercise. Counsel relied on the case of *Esther Wanjiku Mwangi & 3 Others vs. Wambui Ngarachu (2017) eKLR*.

10. Mr. Kenga, learned counsel for the 2nd, 3rd and 4th defendants in the suit Mombasa ELC No. 3 of 2015, and the 2nd – 32nd and 41st plaintiffs in the Originating Summons, made oral submissions where he inter alia submitted that the order for survey was only to pick out portions occupied by the 4 defendants in the suit Mombasa ELC No. 3 of 2015. He submitted that there was no order for other structures of other persons, and if the application is allowed, it will affect other persons. He submitted that orders should not target people against whom the orders were not made. He was of the view that the application should be dismissed and the matter to proceed for hearing.

11. Mr. Kamunda, learned counsel for the 1st defendant in the suit Mombasa ELC No. 3 of 2015 did not file anything within the time frame given and did not make any submissions.

12. I have considered the application. I have already mentioned that I have before me two consolidated suits being Mombasa ELC No. 232 of 2014 (OS) and the suit Mombasa ELC No. 3 of 2015. The orders of 6 July 2018 were made in the suit Mombasa ELC No. 3 of 2015 and indeed they were made before the two suits were consolidated on 2 November 2018. It follows that the said orders of 6 July 2018 were only against the 4 defendants in the suit Mombasa ELC No. 3 of 2015. The 4 defendants were restrained from interfering with the protected plots, but were allowed to use the other plots that they were in occupation of, pending the hearing and determination of the suit. In this application, the applicants allege that the defendants have violated the order by erecting illegal structures on the protected plots and subdividing and selling them off to third parties. They also contend that they have obtained titles surreptitiously. The applicants rely on a survey that they conducted on the suit land in September 2021.

13. It does indeed appear that there are some developments on the protected plots which may not have been there when the first survey of 2015 was done. However, what I do not have is evidence that these developments have been made by the defendants in the suit Mombasa ELC No. 3 of 2015, for it is them who are tied by the order of 6 July 2018. We must be alive to the fact that there is the other case for adverse possession, filed by 41 persons, and it is probable that occupation of the other parcels of land is with these 41 persons who were not the subject of the order of 6 July 2018. They have a pending case where they seek to be declared owners of part of the suit land by way of adverse possession. I agree with the submissions made by Mr. Kenga and Mr. Muyala, that issuing the orders sought in this application may end up affecting persons who were not subject to the order of 6 July 2018 and may result in a premature determination of their suit. I am thus not persuaded to issue the order of mandatory injunction sought by the applicants.

14. I need not say more. The result is that this application is dismissed with costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA